

Remarks

This amendment is submitted in response to the Office Action mailed 28 January 2005, in connection with the above-identified application (hereinafter, the "Office Action"). The Office Action provided a three-month shortened statutory period in which to respond, ending on 28 April 2005. Submitted herewith is a Petition for a Three-Month Extension of Time extending the due date to 28 July 2005. Accordingly, this amendment is timely submitted.

Claims 1 through 24 are currently pending. Applicant respectfully requests the entry of the amendments to claim 1. Applicant respectfully submits that the amendments to the pending claim does not introduce new matter. More specifically, the basis for the amendment to claim can be found in paragraphs 10 and 31 of the application as published.

Claims rejections under 35-USC §102(b)

The Examiner has rejected claims 1-9, 11-20 and 22-24 under 35-USC §102(b) as being anticipated by Liebrecht, et al. (United States Patent Number 6,106,874). Liebrecht relates to a beverage as a source of calcium (abstract). Liebrecht ('874) specifically uses a depectinized fruit juice (abstract, specification and claim 1). The present invention as now claimed in claim 1 claims as an element "a source of fruit juices in an amount from about 5 to about 40 wt % of the composition, wherein said fruit juice is not specially processed", thus excluding the use of depectinized fruit juice from the claimed scope. Specifically, U.S. Pat. No. 6,106,874 discloses a clear, low viscosity, nutritional beverage comprising water, depectinized fruit juice, a source of calcium, and whey protein isolates that relies on the use of **specially processed** [emphasis added] fruit juices to avoid these common problems. (paragraph 6 of the present application as publication).

Thus, in view of the foregoing arguments, Applicant respectfully requests that these rejections under 35 U.S.C. §102(b) be withdrawn.

Claims rejections under 35-USC §103

The Examiner has rejected Claim 10 under 35 USC §103 Liebrecht in view of Burke (GB 2335134A). As admitted by the Examiner, Liebrecht does not disclose the use of whey protein hydrosylates. Applicant believes that Liebrecht does not apply to the present invention for the reasons stated above.

Applicants respectfully submit that this rejection is improper because a prima facie case of obviousness has not been established. The three elements of a prima facie case of obviousness are: 1) some suggestion or motivation to modify the reference or combine the teachings; 2) a reasonable expectation of success and 3) the prior art references must teach or suggest all the claim limitations. Fine 837 F.2d 1071 (Fed.Cir 1988), In re Jones 958 F.2d 347

(Fed.Cir 1992). Burke relates to a carbonated sports drink of high caloric value people engaged in physical activities, and Liebrecht is specifically for providing calcium supplementation. The mere fact that references can be combined or modified does not render the resultant combination obvious unless the prior art also suggests the desirability of the combination. In re Mills, 16 USPQ2d 1430 (Fed. Cir. 1990). Neither reference suggests the desirability of the combination since their intended uses are dramatically varied.

Turning now to the second element of obviousness, there is no reasonable expectation of success. Contrary to a reasonable expectation of success, Burke states that protein hydrosylates have a problem that they tend to precipitate (page 3, lines 22-28), and thus need specific levels of specific carbohydrates to prevent this precipitation. Further in the present application in ¶ 5 it describes that "The development of fruit juice based beverages containing proteins, carbohydrates, vitamins, and minerals is very difficult. The interaction of the ingredients, particularly the protein with the minerals and other ingredients, often cause the protein to precipitate and frequently cause the entire composition to become very viscous or to gel. Similarly, these interactions may change the physical or chemical properties of the composition in a way that adversely affects the taste, color, odor, mouth-feel and other physical properties of the composition. These adverse changes may occur at any time but are particularly likely when the composition is heated during processing or when the composition sits on the shelf for extended periods.

Further, the Federal Circuit has clearly stated that "each prior art reference must be evaluated as an entirety, and ...all of the prior art must be evaluated as a whole". In re Fritch, 23 USPQ2d 1780, 1782. (Fed. Cir. 1992). And particularly on point, the CCPA had earlier said "[t]he test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art." In re Keller, 108 USPQ 871, 881 (CCPA 1981). Applicant submits that the teachings of Liebrecht, a calcium supplement, and Burke, a carbonated sports beverage, would not have suggested to those of ordinary skill in the art to be combined.

Even if they were to be combined, the solution proposed by Applicant would not be achieved since they still would not teach how to combine the ratio of ingredients claimed in Claim 10, nor a clear, palatable beverage, without precipitate of the protein.

Thus, in view of the foregoing arguments, Applicant respectfully requests that these rejections under 35 U.S.C. §103 be withdrawn.

The Examiner has rejected Claim 21 under 35 USC §103 Liebrecht in view of Harado (JP 404311378A). Applicant believes that Liebrecht does not apply to the present invention for the reasons stated above. Turning to Harado, Harado discloses a polyfructan containing liquid composition using inulin. There is no motivation to combine Liebrecht and Harado since

Liebrecht is specifically for providing calcium supplementation and Harado deals with fiber supplementation. Each designed to address very different issues. The mere fact that references can be combined or modified does not render the resultant combination obvious unless the prior art also suggests the desirability of the combination. In re Mills, 16 USPQ2d 1430 (Fed. Cir. 1990). Applicant submits that there is no desirability of the combination of Liebrecht's calcium supplement with Harado's fiber supplement to produce the invention as claimed in claim 21.

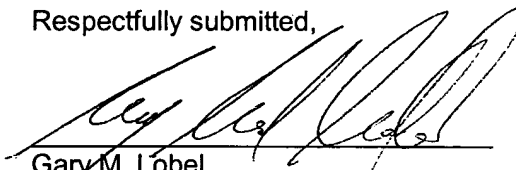
Applicant submits that even if the skilled person were to combine the teaching of Liebrecht and Harado, the solution proposed by Applicant would not be achieved. As described above regarding ¶ 5, that "The development of fruit juice based beverages containing proteins, carbohydrates, vitamins, and minerals is very difficult. The interaction of the ingredients, particularly the protein with the minerals and other ingredients, often cause the protein to precipitate and frequently cause the entire composition to become very viscous or to gel." Therefore, the combined references would not teach or suggest how to make a clear, palatable beverage, without precipitate of the protein, and there is no reasonable expectation of success.

Thus, in view of the foregoing arguments, Applicant respectfully requests that these rejections under 35 U.S.C. §103 be withdrawn.

Applicant respectfully requests reconsideration of the present application. If a telephone interview would be of assistance in advancing the prosecution of the application, Applicants' undersigned attorney invites the Examiner to telephone him at the number provided below.

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Respectfully submitted,



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